

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

**CHRISTIE BOWERS,**

**Plaintiff,**

**vs.**

**ROBIN KLETKE and ROBIN COHEN,  
husband and wife and the marital  
community composed thereof,**

**Defendants.**

**NO. C08-1768RSM**

**PLAINTIFF'S REPLY TO  
DEFENDANTS' RESPONSE TO  
PLAINTIFF'S MOTION  
FOR LEAVE TO FILE  
FIRST AMENDED COMPLAINT**

**I. Objection re Offering Alleged Settlement Conference Statements**

The Plaintiff first objects to the Defendants' offering statements that they allege were made during the parties' recent settlement conference, which were protected under Rule 408 to the Federal Rules of Evidence. Plaintiff respectfully asks that the Court admonish the Defendants to avoid this from happening in the future.

**II. Reply to Defendants' Response**

Johnson v. Mammoth Recreations, Inc., 975 F.2d 604 (9<sup>th</sup> Cir. 1992) is not controlling because it involved a motion to amend to add a new party beyond the cutoff date for joining new parties in the Case Scheduling Order. The Johnson court explained that its holding

1 was limited to the following narrow issue: "This case turns on a single, narrow question:  
2 when and under what circumstances may a party join an additional defendant once the  
3 district court has entered an order limiting the time for joinder." Johnson, 975 F.2d at 607.  
4 Here, the Plaintiff does not seek to join new parties beyond the deadline in the Order  
5 Setting Trial and Related Dates. Therefore, Johnson has no bearing here.

6 The four factors set forth in Lockheed Martin Corp. v. Network Solutions, Inc., 194  
7 F.3d 980 (9<sup>th</sup> Cir. 1999), cited on page 5 of the Defendants' Response, support the granting  
8 of the Motion for Leave to File First Amended Complaint. The motion is not brought in bad  
9 faith, the delay is excusable under the odd procedural circumstances of this case, there in  
10 no prejudice to the Defendants and the proposed amendments are not futile.

11 The proposed amendments are not brought in bad faith; they are clarifying  
12 amendments that accomplish three things: First, they clarify that Plaintiff's claims, and  
13 statutory right to relief, arise under both Title I and Title II of the Electronic Communications  
14 Privacy Act. Second, they clarify that Plaintiff is not alleging that the Defendants viewed  
15 exactly 139 emails. And third, they clarify Plaintiff's state statutory claim by including  
16 language from the statute RCW 9.73.030 and its civil remedy counterpart RCW 9.73.060.  
17 Since notice pleading standards apply, FRCP 8(a)(2), the amendment is not even legally  
18 necessary, but for purposes of clarifying the issues for resolution to enable judicial  
19 economy, the Plaintiff brought the motion.<sup>1</sup>

20 The delay in this case is not "undue" and is excusable under the odd procedural  
21 circumstances of this case. First, most of the delay is attributed to Plaintiff's original  
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<sup>1</sup> The Defendants appear to not object to the proposed amendments to Plaintiff's Title I ECPA claim nor the Washington state statutory claim. Therefore, Plaintiff will focus this Reply on ECPA Title II.

1 counsel's failure to prosecute this case or return calls to former defense counsel or his  
2 client. The Court is dealing with this delay through its review of the Defendants' pending  
3 Motion for Monetary Sanctions re Gergory Cavagnaro (Dkt. # 65). The delay attributed to  
4 Mr. Cavaganaro going AWOL has also been dealt with the motion to dismiss, which was  
5 denied on March 1, 2010 (see Dkt. # 59) and the granting of Plaintiff's unopposed Motion to  
6 Reset the Trial Date and Extend the Date for Completion of Discovery and Other  
7 Subsequent Dates (Dkt.# 80 and Dkt. # 92 – Order Setting Trial Dates and Related Dates).  
8 The Defendants have every right to be frustrated with Mr. Cavagnaro's having gone AWOL  
9 on the case, but his delay should not be visited upon this issue.  
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11 Further, the brief 3-1/3 month delay in bringing the Motion for Leave to File First  
12 Amended Compliant is excusable. First, the original complaint encompasses a Title II  
13 ECPA claim due to the references to "unauthorized access" stated therein. This is why  
14 there have been many references to Title II of ECPA in the filings from Ms. Bower's new  
15 counsel. These references are set out in the chart on pages 3 and 4 of the Plaintiff's  
16 Motion for Leave to File First Amended Compliant and on pages 6 and 7 of this same filing.  
17 (Dkt. # 87). This is also why Plaintiff characterizes the Motion for Leave to File First  
18 Amended Compliant as a clarifying motion. It is hoped that by granting this Motion for  
19 Leave to Amend, the court will help the *pro se* Defendants clearly and unequivocally  
20 understand what they are up against, and that this may help the parties resolve this case  
21 short of trial. Second, 3-1/3 months is not a long delay for new counsel to come in and get  
22 up to speed on a case with procedural irregularities caused by the original Plaintiff  
23 counsel's AWOL status. Finally, the discovery cutoff date is now August 3, 2010 (Dkt. #  
24 92). This gives the defense and the Plaintiff roughly two months to finish discovery and the  
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1 defense can engage in new discovery directed at the proposed amendments if they feel the  
2 need to do so. As stated above, notice pleading standards apply here, but Plaintiff's  
3 counsel did not want to rely on that fact when a specific recitation to the statutory basis for  
4 Plaintiff's claim and remedies could be provided to Defendants by seeking to leave to  
5 amend the complaint.

6 **A. The Defendants incorrectly state that they limited their discovery efforts to a**  
7 **Wiretap Act claim; they cannot credibly suggest that they are surprised.**

8 On page 5 of the Plaintiff's Initial Disclosure, at lines 4-7 (Dkt # 10), Plaintiff identified  
9 the following relevant documents:

10 Letter from Jeffrey Foster to SonoSite reporting unauthorized access to plaintiff's  
11 email account. Response to Mr. Foster's letter from Kathryn Surace-Smith  
12 providing the findings of the internal investigation and his unauthorized access to  
13 the Plaintiff's email account.

14 Juno Online webmail connection logs regarding Plaintiff's email account from  
15 March through November 2007 establishing that the Defendants accessed the  
16 Plaintiff's email account without her knowledge on at least 193 separate  
17 occasions.

18 (Dkt # 10).

19 With respect to a proposed witness from SonoSite, Inc., Plaintiff's Initial Disclosure  
20 states that the witness has "Knowledge of internal investigation at SonoSite finding that  
21 Robin Kletke secretly logged onto Plaintiff's email account from SonoSite Computers on  
22 several occasions. (Dkt. # 10 at 2; lines 13-15). These facts and documents allege a Title  
23 II ECPA claim. Plaintiff's Initial Disclosure was filed over one year ago, on March 6, 2009.  
24 It is simply not believable that the defense is surprised that Title II of the ECPA provides a  
25 remedy for this conduct. No prejudice to the defense will result from the granting of the  
26 Motion for Leave to File First Amended Complaint.

1 Further support for a lack of prejudice—and a finding that Title II of ECPA has been  
2 litigated by notice pleading and also consent—is found in the Defendants’ discovery.  
3 Indeed, the defense conducted discovery into Plaintiff’s allegations of unauthorized access  
4 into her email. For example, Defendants’ First Set of Interrogatories and Requests for  
5 Production to Plaintiff, at Interrogatory No. 8 states: “You allege in your Complaint that on  
6 or about September of 2007, you were advised that the Defendants had been secretly  
7 obtaining access to your email. Please state as to that allegation.” (See **Ex. 1** to Walters  
8 Declaration in Support of Plaintiff’s Reply to Defendants’ Response to Plaintiff’s Motion for  
9 Leave to File First Amended Complaint (“Walters Reply Decl.”). The answers to this and  
10 Interrogatory No. 7 also include allegations of illegal access to Plaintiff’s email:  
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12 Log in records provided by Juno and emails from Robin Cohen and Robin Kletke  
13 . . . . showed that Ms. Cohen and Mr. Kletke (via the IP Addresses) had been  
14 illegally accessing my email.

15 (Answer to Interrogatory No. 7; **Ex. 1** to Walters Reply Decl.).

16 I contacted Juno, Wilson Lilin, and he provided me with 6 months of login reports  
17 from my [texdandy@juno.com](mailto:texdandy@juno.com) account. I began checking the IP addresses  
18 through a website that tells you where the IP addresses originate from. I soon  
19 found that Mr. Kletke and Ms. Cohen had been logging in to my email. One of the  
20 IP addresses belonged to a company named Sonosite, Inc. After contacting them  
21 through my attorney, they verified that Mr. Kletke had used their computer to  
22 access my email.

23 (Answer to Interrogatory No. 8; **Ex. 1** to Walters Reply Decl.).

24 More recently, in their Motion for Reconsideration, the Defendants, now *pro se*, stated  
25 that “Plaintiff filed suit in December of 2008 claiming that the Defendants had accessed and  
26 viewed emails from her Juno.com email account.” (Dkt. # 67, at 2, lines 2-4; underlining in  
original). The record demonstrates that the defense has known all along that Plaintiff’s  
claims included allegations of unauthorized access, and that they conducted and received

1 discovery towards these allegations. There is no prejudice here and the issue has been  
2 litigated. FRCP 15(b). The court should grant Plaintiff's Motion for Leave to File First  
3 Amended Complaint.

4 Finally, the proposed amendments are not futile. Title II of ECPA permits a cause of  
5 action against anyone who "intentionally accesses without authorization a facility through  
6 which an electronic communication service is provided ... and thereby obtains, alters, or  
7 prevents authorized access to a wire or electronic communication while it is in electronic  
8 storage." 18 U.S.C. §§ 2701(a)(1), 2707(a). "[E]lectronic storage" means either "temporary,  
9 intermediate storage ... incidental to ... electronic transmission," or "storage ... for purposes  
10 of backup protection." *Id.* § 2510(17). In Theofel v. Farey-Jones, 359 F.3d 1066, 1070 (9th  
11 Cir.2004), the Ninth Circuit held that a provider of e-mail Internet Service Provider (ISP) like  
12 [www.juno.com](http://www.juno.com) is an electronic communication services as defined by ECPA's Title II and  
13 that the emails stored on the ISP's servers qualified as backup storage as defined by  
14 ECPA's Title II. Theofel, 359 F.3d at 1075. Theofel is on point and supports Plaintiff's Title  
15 II ECPA claim and right to relief under Title II. A plaintiff can obtain statutory damages in a  
16 Title II ECPA of \$1000.00 for each unauthorized intrusion. 18 U.S.C. § 2707(c). In Konop v.  
17 Hawaiian Airlines, Inc., 355 B.R. 225 (D.Hawaii 2006), the court held that the \$1000  
18 statutory minimum damages amount "refer[s] to each unauthorized intrusion in violation of  
19 [Title II of the ECPA]." Konop, 355 B.R. at 230. In this case, we have evidence that the  
20 Defendants logged on to Ms. Bower's email over 135 times. Thus, statutory damages in the  
21 range of \$135,000.00 are allowable at trial. The proposed amendment is not futile because  
22 the statutory law protects Plaintiff against the very actions in which the Defendants engaged.  
23 The amendments concern the quantum of damages arising out of facts which the parties  
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1 have had notice of since the inception of the case. Moreover, the original complaint includes  
2 the standard "catchall phrase" in its prayer for relief: "For such other and further relief as the  
3 court may permitted by law or which the Court deems equitable, appropriate or just." (Dkt. #  
4 1). Relief under Title II of the ECPA has always been available to the Plaintiff on the facts  
5 alleged; the First Amended Complaint simply clarifies this fact. The court should grant  
6 Plaintiff's Motion for Leave to file First Amended Complaint.  
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### 8 **III. Conclusion & Request for Relief**

9 Allegations of unauthorized access have existed since the inception of this case.  
10 Plaintiff's Motion for Leave to Amend, merely clarifies that, if these facts are proven at trial,  
11 part of the damages available to them will be authorized by Title II of ECPA. The  
12 Defendants have known about these allegations from the start of this case, and they  
13 conducted and received discovery on these allegations. Further, since joining the case,  
14 Plaintiff's new counsel repeatedly referred to Title II ECPA in his filings without objection,  
15 and the Defendants' Motion for Reconsideration indicates that they understand that his case  
16 is about their unauthorized access to Plaintiff's email. See FRCP 15(b)(2).  
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18 The federal system of notice pleading requires only that the Plaintiff provide "a short  
19 and plain statement of the claim showing that the pleader is entitled to relief." FRCP 8(a)(2).  
20 FRCP 15(a)(2) provides that the court "should freely give leave when justice so requires."  
21 Justice requires leave in this case because the clarifying amendments are intended to clarify  
22 to the Defendants that the repeated allegations of unauthorized access to her email in  
23 Plaintiff's original complaint provide a remedy under Title II of the ECPA. No prejudice to the  
24 Defendants' trial preparation occurs from granting the Motion for Leave to Amend.  
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1 Plaintiff respectfully asks that the court grant this Motion for Leave to File First  
2 Amended Complaint.

3 Dated this 28<sup>th</sup> day of May 2010.

4 WALTERS LAW FIRM PLLC

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11 Mark Walters, WSBA 25537  
12 Attorney for Plaintiff, Christie Bowers  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of May, 2010, I electronically filed the documents listed below with the Clerk of the Court using the CM/EFC system which will send notification of such filing to the following:

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**Documents Filed**

1. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Leave to File First Amended Complaint;
2. Declaration of Mark Walters in Support of Plaintiff's Reply to Defendants' Response to Plaintiff's with attached exhibit.

1 And I hereby certify that I have mailed by United States Postal Service the document  
2 to the following non CM/EFC participants:

3 **Not applicable.**

4 Dated: May 28<sup>th</sup>, 2010

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9 Mark Walters  
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